

Pending before the Court is a Request for Review of a Commissioner's Order (ROCO) filed by E. D. ("Father"). The Petitioner contests the Order entered by Commissioner Susan Tussey on July 10, 2018 regarding child support. The ROCO contests one issue from the July 10, 2018 Order, namely that the Court erred in not giving Father a parenting time adjustment.

STANDARD OF REVIEW

A party may seek a review of a Commissioner's Order pursuant to 10 *Del. C.* § 915(d)(1), which provides:

Any party, except a party in default of appearance before a Commissioner, may appeal a final order of a Commissioner to a judge of the Court by filing and serving written objections to such order, as provided by the rules of Court, within 30 days from the date of the Commissioner's order. A judge of the Court shall make a *de novo* determination of those portions of the Commissioner's order to which objection is made. A judge of the Court may accept, reject, or modify in whole or in part the Order of the Commissioner. The judge may also receive further evidence or recommit the matter to the Commissioner with instruction.¹

Because this was a Commissioner's final order, the Court reviews the Order *de novo*.²

According to *Black's Law Dictionary* a *de novo* review is "[a]n appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings."³ Pursuant to Family Court Civil Rule 53.1(b), an appeal of a Commissioner's Order must "set forth with particularity the basis for each objection."⁴ Upon taking the matter under review, a judge of the Court will make a *de novo* determination regarding the objected to portions of the Commissioner's Order.⁵ A judge will make an independent decision by

¹ 10 *Del. C.* § 915(d)(1).

² *Id.*

³ *Black's Law Dictionary* (10th ed. 2014).

⁴ FAM. CT. CIV. P. R. 53.1(b).

⁵ 10 *Del. C.* § 915(d)(1); *see also* FAM. CT. CIV. P. R. 53.1(e).

reviewing the Commissioner's findings of fact determined at the Commissioner's hearing, any testimony and documentary evidence on the record, and the specific objections of the moving party.⁶

PROCEDURAL BACKGROUND

Father filed a petition to decrease child support on 2/20/2018 due to his need to pay for child care and an increase in his health insurance. The Court held a hearing on June 27, 2018 and entered an Order on July 10, 2018. The Order entered by the Court actually resulted in an increase in child support. Father filed a Motion for Reargument on July 20, 2018 alleging that the Court should vacate the July 10, 2018 Order as Mother did not file a counterclaim to increase child support. This Motion was denied on August 3, 2018 as Family Court Rule of Civil Procedure 508(d) indicates that the Court can adjust child support up or down in a modification proceeding regardless of who filed the Petition. On August 31, 2018, Father filed this ROCO. The Court further notes that the Court entered an Order on February 9, 2018 on the cross Custody Petitions that allowed Y. L. S. ("Mother") to relocate with the Children to Vancouver, Canada and gave Father visitation for two (2) weeks out of every ten (10) weeks.

ARGUMENTS RAISED

In the ROCO, Father raises one objection to the July 10, 2018 Order. Father alleges that pursuant to Family Court Civil Rule 505(c) he is entitled to a 10% parenting time adjustment. Father further contends that Family Court overlooked evidence of the parenting time adjustment. He alleges that the number of overnights must be established by clear and convincing evidence, although it is not clear where Father is placing the burden of proof. The Court recognizes that

⁶ *C.M. v. L.A.*, 2007 WL 4793042, at *1 (Del. Fam. Ct. Dec. 27, 2007).

pursuant to Rule 505(c)(1) that if a party is claiming overnights other than as written in the court order, that party carries the burden of proof.

The Court notes that the transcript for this child support is hearing is rather lengthy for a child support matter, consisting of approximately 153 pages. Many issues were raised and testimony was provided for numerous issues, including, but not limited to: Canadian child benefits, Canadian day care subsidies, overtime, Father's bonus, rental income and capital gains. There was no testimony during the lengthy hearing regarding the parties' custody and visitation schedule. Father raises the issue for the first time in closing argument, after all the evidence was entered. Father did not testify to any facts giving rise to an adjustment amount different than the number of overnights in the current Court order. Mother therefore was not able to testify in response to these allegations. The various attachments to the ROCO cannot be considered for the first time in the ROCO. Mother has not had any opportunity to object to their coming into evidence when they are simply attached to the back of the ROCO. This is not the first time that the Court has explained to Father that evidence must be introduced at the hearing.

According to the Custody Order entered on February 9, 2018, Father has the children two (2) out of every ten (10) weeks. At the hearing, Father argued after the close of the evidence that the parties would also each have an additional two weeks of vacation time pursuant to the Order. Mother did not agree with Father's interpretation. The Custody Order does not provide for these additional weeks and the parties both appeared to agree that the Custody Order does not provide for these additional two weeks.

As Father has the burden of proving that his visitation is not as set forth in the Custody Order and as Father did not meet that burden, the Commissioner appropriately used the number

of overnights in the February 9, 2018 Order. Father has two (2) out of every ten (10) overnights. This equates to 20% of the total overnights in a year or 73 overnights. This is less than the 80 overnights needed for the 10% parenting time adjustment.

CONCLUSION

For the foregoing reasons, the Court finds that the Commissioner's Order is
AFFIRMED.

IT IS SO ORDERED.

FELICE GLENNON KERR, Judge

Cc: Parties/Counsel
The Honorable Susan Tussey

Date mailed: